(16)

No. 90-1038

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS CIPOLLONE, PETITIONER

v.

LIGGETT GROUP, INC., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC"), respectfully submits this brief as *amicus curiae* in support of respondents. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of the Court.

PLAC is a non-profit membership association of approximately 80 major industrial companies.[1] Formed in 1983, PLAC's principal purpose is to submit briefs as *amicus curiae* in appellate cases involving significant issues affecting the law of product liability. PLAC has participated as *amicus curiae* in numerous cases in this Court, the federal courts of appeals, and state appellate courts.

PLAC and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising in product liability cases. In particular, PLAC is vitally concerned about the issue of federal preemption of state tort claims. PLAC and its members have been involved in numerous product liability and other cases that present issues of federal preemption.

Because of PLAC's substantial interest in the outcome of this case, and because of its extensive experience in product liability suits, PLAC is able to provide an additional and broader perspective on the important issues presented. PLAC believes that its *amicus* brief will be of assistance to the Court in analyzing and resolving these issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is not whether cigarette manufacturers should be subject to legal obligations relating

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[1] A list of PLAC's members is included in the Appendix to this brief.

to their communications with the public about the health dangers of smoking cigarettes. Rather, the sole question is: *who decides* what communications are appropriate? In our view, Congress itself has made that decision in the Federal Cigarette Labeling and Advertising Act by drafting, monitoring, and revising the required warning label in order to ensure its adequacy. Furthermore, to provide national uniformity and protect interstate commerce, Congress intended the Act to set forth an exclusive warning regime that displaces state law concerning the health aspects of cigarette labeling and the promotion or advertising of cigarettes. If our submission is correct, respondents—whose warning labels concededly conform to the requirements of the Act—have complied fully with federal law and may not be subject to inconsistent regulation under state law.

Petitioner and his *amici* concede that the Labeling and Advertising Act preempts state statutes and regulations imposing warning requirements on cigarette packages or in cigarette advertising. Nevertheless, they assert that the Act does not displace the state common law of torts imposing the identical requirements. Under this position, it would be up to judges and juries in 50 different states to determine the adequacy of warnings or advertising on a case-by-base basis, and in doing so they would be entirely free to disregard the federal warning scheme and to conclude that "better" warnings should have been provided notwithstanding Congress's determination that the federally-required warning label is adequate.

Petitioner's approach cannot be reconciled with the express statement of purpose and preemption provision in the Act and, contrary to the system Congress clearly contemplated, represents a prescription for disuniformity and onerous burdens on interstate commerce. Whether analyzed under principles of "express" preemption (because the Act expressly preempts state law), "occupation of the field" preemption (because Congress occupied the field of the health-related aspects of cigarette labeling, advertising and promotion), or "implied" preemption (because state tort law would frustrate the purposes of the Act), petitioner's reading of the federal statute cannot stand.

Moreover, petitioner's submission that the Labeling and Advertising Act does not preempt state tort law is predicated on several erroneous propositions that are of substantial importance in preemption cases generally.

First, petitioner contends that the term "State law" does not include state common law. This counterintuitive contention is belied both by the plain meaning of the words used and by the precedents of this Court.

Second, petitioner argues that state tort law does not "require" defendants to observe a state-imposed standard of conduct because they can "choose" to engage in tortious activity so long as they are willing to pay the resulting damages awards. This argument ignores hornbook law on the "duties" imposed under state tort law, incorrectly assumes that tort law is indifferent to the repeated and intentional commission of torts, and is flatly inconsistent with the numerous decisions of this Court holding that state tort damages are regulatory in nature and thus are preempted if they are at odds with a federal statutory scheme.

Third, petitioner urges that preemption is inappropriate if Congress does not provide an alternative remedy in lieu of the traditional state law that is displaced. But Congress on many occasions has preempted a state-law remedy without enacting a federal substitute. In addition, the premise of petitioner's argument is incorrect, because the Labeling and Advertising Act does contain effective alternative remedies.

Finally, petitioner asserts that state tort claims would promote the objectives of the federal statute by providing more information to the public about the relationship between smoking and health. Congress's purpose, however, was to inform the public while at the same time protecting the national economy against diverse and burdensome

warning requirements, and state tort law would plainly conflict with the latter objective. In any event, it is no answer to preemption "to say that the ultimate goal of both federal and state law is" the same, for "state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987). Here, there can be no doubt that Congress determined that the best way to achieve its goal was by requiring a simple, uniform, nationwide warning on every cigarette package and by prohibiting the states from regulating any health-related aspect of cigarette advertising or promotion.

In the end, all of petitioner's linguistic hide-and-seek games—pretending that "common law" is not law, that duties imposed by state tort law involve no "requirements," that additions to the federal warning made in response to tort liabilities should be deemed "voluntary" —are simply props for an artificial analytical framework, under which state tort law cannot be preempted unless Congress uses magic words such as "common law" or "tort liability." This Court has never accepted that approach in ruling on a preemption claim. Petitioner and his *amici* simply cannot explain why Congress would have wanted to preempt state statutes and regulations that impose different or additional requirements on cigarette labeling, advertising or promotion, yet would have cheerfully agreed to the spectacle of judges and juries across the country imposing the very same requirements in the guise of adjudicating common law claims.

ARGUMENT

After extended consideration, Congress determined that the best way to inform the public about the "relationship between smoking and health" while protecting "commerce and the national economy" from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" was to "establish a comprehensive Federal Program to deal with cigarette labeling and advertising." 15

U.S.C. § 1331. To effectuate those goals, Congress *itself* prescribed the precise words of warning to be placed on each package of cigarettes (15 U.S.C. § 1333) and required the Federal Trade Commission and the Secretary of Health and Human Services to report to it annually about cigarette promotion and advertising practices and current information on the health consequences of smoking and to make recommendations for legislation. 15 U.S.C. § 1337. Finally, Congress enacted an express preemption provision prohibiting the states from requiring *any* other statement "relating to smoking and health * * * on any cigarette package" or imposing *any* "requirement or prohibition based on smoking and health" with respect to the "advertising or promotion of any cigarettes" whose packages are labeled in conformity with the federal statute. 15 U.S.C. § 1334.

Despite the comprehensiveness of this federal program, the clarity of Congress's purpose to reserve to the federal government the regulation of "cigarette labeling and advertising with respect to any relationship between smoking and health" (15 U.S.C. § 1331), and the presence of a broadly-worded preemption provision, petitioner asserts that Congress did not intend to foreclose claims under state *tort* law that the labeling or advertising of cigarettes misinformed consumers about the dangers of smoking. In petitioner's view, Congress's meticulously calibrated judgment as to the health warning that cigarette manufacturers should be required to give must be respected by state legislatures and administrative agencies but may be freely disregarded by state courts and juries enforcing duties derived from amorphous and divergent common law standards of "adequacy." This approach would authorize the states to impose sanctions on manufacturers by finding that the warning Congress expressly determined to be adequate is in fact *in*adequate as a matter of state law. Such assaults on the integrity of the "comprehensive Federal Program" created by Congress are incompatible with the words of the Labeling and Advertising Act and would deeply subvert its purposes.

Petitioner defends this bizarre result by presenting an analytical structure (Pet. Br. 14-16) that rests on a rigid and artificial compartmentalization of the various types of preemption. As respondents demonstrate, however, the Court's familiar three-part preemption formulation was never intended to be applied in so wooden or literal a manner. See *English* v. *General Electric Co.*, 110 S. Ct. 2270, 2275 n.5 (1990) ("[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct"). Rather, the question here turns solely on the purposes of Congress, to be resolved through the normal tools of statutory construction. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990); *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983). We submit that the language, structure and purpose of the Labeling and Advertising Act leave no doubt that petitioner's warning and advertising claims are preempted. Whether viewed as a question of "express preemption," "conflict preemption," or "occupation of the field," the conclusion is inescapable that federal law cannot coexist with state tort claims challenging health-related aspects of the labeling, advertising or promotion of cigarettes.

I. THE CIGARETTE LABELING AND ADVERTISING ACT EXPRESSLY PREEMPTS STATE LAW, INCLUDING STATE COMMON LAW, CONCERNING THE HEALTH ASPECTS OF CIGARETTE WARNING LABELS AND THE PROMOTION OR ADVERTISING OF CIGARETTES

On its face, the Cigarette Labeling and Advertising Act contains a broad and unqualified preemption provision:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. In light of this statutory language, petitioner concedes, as he must, that the Act *expressly* "prohibits states from regulating cigarette packaging, and cigarette advertising." Pet. 4. Nevertheless, petitioner asserts that there is no express preemption in this case because Section 1334 does not explicity refer to state common law tort claims. This literalistic approach misapprehends the nature of express preemption.

A. The Phrase "State Law" Includes State Common Law.

Section 1334(a) and (b) as originally enacted in 1965, and Section 1334(a) as retained in 1969, are expansive in scope and contain no limitation on the type of law that is subject to preemption. Thus, in singularly sweeping and unambiguous language, they provide that "[*n*]*o* statement relating to smoking and health"—whether under federal, state, or local law, and whether statutory, administrative, or common law in nature—may be imposed in addition to the federally required warning.

Section 1334(b) as amended in 1969 leaves no more room to carve out an exception for state common law. By its terms, this preemption provision encompasses *any* requirement or prohibition based on smoking and health "under State law" with respect to the advertising or promotion of cigarettes. Although petitioner offers the half-hearted argument (Br. 24) that state common law is not really "State law," this Court's cases foreclose that contention. As the Court recently explained in holding that the Interstate Commerce Act's reference to "all other law, including State and municipal law," includes state common law:

> As always, we begin with the language of the statute * * *. [The phrase] "all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew * * * between positive enactments and common-law rules of liability.

Norfolk & W. R. Co. v. *Train Dispatchers*, 111 S. Ct. 1156, 1163 (1991). See also, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[w]e see no reason not to give 'laws' its natural meaning * * *, and therefore conclude that * * * [it embraces] claims founded upon * * * common law as well as those of statutory origin"); *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 71, 79 (1938) (citation omitted) (law includes "the unwritten law of the State as declared by its highest court * * *. '[T]he authority and only authority is the State * * * whether it be of its Legislature or of its Supreme Court'").

Of course, as petitioner points out (Br. 18), Section 1334 does not refer *in haec verba* to state common law. But neither does it refer to state statutes or regulations, both of which petitioner admits are expressly preempted. In either event, it is simply a question of statutory construction to determine the meaning of Congress's enactment. If, as plainly is the case, state common law is subsumed within the generic term "State law," it is subject to the express preemption provision in Section 1334.[2]

B. The Common Law Of Torts Imposes "Requirements" And "Prohibitions."

Since "State law" unquestionably includes state common law, petitioner resorts to the term "required" or "requirement" in Section 1334. In his view, the state common law of torts does not "require" defendants to conform their conduct to state-created and state-enforced standards because, in contrast to statutes and regulations, it does not contain "[t]he element of compulsion."

> [C]ommon law product liability lawsuits do not compel specific behavior. Such lawsuits operate primarily to compensate injured individuals; they do not regulate. * * * Damage awards in product liability suits do not compel any behavior other than the payment of money damages. Cigarette manufacturers are free to build these damage awards into the price of their product and do nothing else or, alternatively, they may with unconstrained choice attempt to reduce the likelihood of future adverse verdicts.

Pet. Br. 19, 20-21 (citations omitted); see also *id.* at 40-42. This argument is ridiculous, bears little relation to reality, and cannot be squared with either general legal principles or the settled decisions of this Court.[3]

It is elementary learning that tort liability may be imposed only if the defendant has violated a duty owed to the plaintiff. Indeed, the very authority cited by petitioner (Br. 20) makes clear that "torts consist of the breach of *duties fixed and imposed upon the parties by the law itself*." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS 4 (5th ed. 1984) (emphasis added). See also, *e.g.*, BLACK'S LAW DICTIONARY 1335 (5th ed. 1979) ("Tort" is defined to be "[a] violation of a duty imposed by general law * * *. There must always be a violation of some duty owing to plaintiff").

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[2] Although petitioner does not seriously contend that the term "State law" in the Labeling and Advertising Act does not encompass state common law, several of his *amici* attempt to develop the argument. According to this view, all judicial action grounded in state common law—apparently including injunctive relief—is outside the preemptive scope of the Act. See Am. Br. of National League of Cities, *et al.*, at 15, 18 n.10; Am. Br. of American Cancer Society, *et al.*, at 12 n.2, 25 n.9. For the reasons outlined above, nothing in the text of the Act suggests in any way that Section 1334 is confined to state statutes and regulations or that Congress intended *sub silentio* to enact a broad loophole for state common law in the otherwise all-inclusive phrase "State law." Indeed, it is difficult to take seriously the idea inherent in *amici*'s argument that a mandatory injunction under state common law, enjoining the defendant to provide warnings in the future different from or in addition to those prescribed in the federal statute, would not be preempted.

[3] Insofar as petitioner's argument is premised on the notion that defendants can "continue with business as usual * * * and build the damages into the cost of the product" (Br. 42), it apparently would not distinguish tort damages from civil monetary penalties or criminal fines (which, at least as to corporate defendants, constitute the applicable criminal sanction). Yet petitioner concedes that statutes or regulations imposing warning requirements and containing purely monetary penalties would be preempted by Section 1334.

Thus, contrary to the crux of petitioner's position, a duty imposed under the state common law of torts inherently embodies the notion of requirement or obligation. Tort law sets "the conduct *required* of the actor by society for the protection of others." PROSSER AND KEETON at 22 (emphasis added). See also, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 4 (1965) (emphasis added) ("[t]he word 'duty' * * * denote[s] the fact that the actor is *required to conduct himself in a particular manner* at the risk that if he does not do so he becomes subject to liability"); BLACK'S LAW DICTIONARY at 453 (emphasis added) (in tort cases the "term ['duty'] may be defined as *obligation*, to which law will give recognition and effect, *to conform to a particular standard of conduct* toward another"). Accordingly, a court or jury deciding a state tort case cannot rule in favor of the plaintiff without finding that the defendant violated a requirement of state law—for example, in a failure-to-warn case, a state common-law duty to provide a warning different from or in addition to that prescribed by Congress in the Labeling and Advertising Act. State law both imposes the requirement and enforces it through a judgment against the defendant.

Moreover, the law is not, as petitioner would have it, indifferent to defendants' continued tortious conduct and does not afford them an "unconstrained choice" (Pet. Br. 20) between conforming to their legal duty or paying damages. By definition, a tort is "[a] private or civil wrong" (BLACK'S LAW DICTIONARY at 1335) that the law seeks to discourage, and the payment of compensatory damages does not change the wrongful nature of the tortious conduct or legitimize its occurrence.

> [W]hen * * * [one] act[s] negligently or inflict[s] an intentional harm, he or she wrongs the sufferer. The payments exacted by tort law are not taxes or licensing fees for acts that are permitted on condition that the defendants pay for damage thereby caused. A tort is an act that wrongs the victim. The defendant owes the plaintiff a duty, operative at the moment of action, to abstain from committing such an act. The obligation to compensate is the juridical reflex of an antecedent obligation not to wrong.

Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 409 (1989). The condemnatory force of tort law is made clear by the doctrine of punitive damages, which are designed to punish and deter reprehensible conduct. See, *e.g.*, *Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979). A defendant that followed petitioner's advice —and thus chose to continue, intentionally and repeatedly, to engage in tortious conduct—would quickly (and justifiably) find itself subjected to ever-increasing punitive damages awards.

Consistent with these accepted precepts, it is a well-recognized purpose of tort law to regulate conduct to conform to state-established legal standards. One leading commentary has summarized the regulatory effect of tort law in the following way:

> The "phophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.

PROSSER AND KEETON at 25. Thus, as the First Circuit aptly stated in rejecting the identical argument that defendants have a "free choice" to comply with tort law or pay repeated damages awards, the verdict "effectively compels the manufacturer to alter its warning to conform to different state law requirements as 'promulgated' by a jury's findings."

> [Plaintiffs] disingenuously maintain that any monetary damages awarded would not compel a manufacturer to change its label for, after all, "the choice of how to react is left to the manufacturer." This "choice of reaction" seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law,

> and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability.

Palmer v. *Liggett Group, Inc.*, 825 F.2d 620, 627-628 (1st Cir. 1987). Indeed, several of petitioner's *amici* unabashedly concede that state tort law imposes legal duties that affect defendants' conduct, and they trumpet that result as the reason why petitioner's common law claims should be allowed.[4]

It therefore is not surprising that this Court consistently has held that state tort damages are regulatory in effect and require defendants to conform their behavior to state tort law. The seminal case in this area is *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which held that an award of damages in a state tort action was preempted by federal labor law. Focusing "on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted" (*id.* at 243), the Court explained (*id.* at 246-247 (emphasis added)):

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.* Even the States' salutary effort to redress private wrongs or grant compensation for past harm

[4] See Am. Br. of Minnesota, *et al.*, at 1, 4; Am. Br. of National League of Cities, *et al.*, at 25, 26; Am. Br. of Surgeons General, *et al.*, at 3; Am. Br. of Trial Lawyers for Public Justice, at 13, 15; Am. Br. of American Medical Association, at 9; Am. Br. of American Cancer Society, *et al.*, at 16.

> cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

This Court has never deviated from the *Garmon* principle, holding time and again that state common-law damages actions have a regulatory effect and are preempted if they are at variance with the federal scheme. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Chicago & N.W. Trans. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); see also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "'a form of regulation'" and that "fear of damage awards" may be "markedly more inhibiting than the fear of prosecution"). As the Court has correctly understood, "[a] system under which each State could, through its courts, impose * * * its own version of reasonable * * * requirements could hardly be more at odds with the uniformity contemplated by Congress." *Kalo Brick*, 450 U.S. at 326.[5]

The Court recently has reaffirmed the *Garmon* analysis. For example, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495, 498-499 n.19 (1987)—a case petitioner virtually ignores—squarely rejected the contention that "compensatory damages only require the [defendants] to pay * * * and thus do not 'regulate'." As the Court stated (emphasis added):

> [If the preempted state remedies were available], at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. * * * *The inevitable result of such suits would be that Vermont and other*

[5] *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), is fully consistent with this position. The Court acknowledged in *Goodyear* that the occasional state workers' compensation award *would* exert "incidental regulatory pressure" (*id.* at 186) on a federally-owned nuclear production facility, but it concluded that Congress had determined that such incidental regulatory effects were "acceptable"—*i.e.*, were *not* in variance with the federal scheme. *Ibid.* See also *id.* at 186 n.8.

States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.

* * * * *

[Although t]he District Court concluded that the interference with the Act is insignificant, in part because respondents are seeking to be compensated for a specific harm rather than trying to "regulate" * * * [,] [w]e decline * * * to draw a line between the types of relief sought.* * * *If the Vermont court determined that respondents were entitled only to the requested compensatory relief, IPC might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory.* * * * [T]his result would be irreconcilable with the [Clean Water Act's] exclusive grant of authority to the Federal Government * * *.

Similarly, in *Ingersoll-Rand Co.* v. *McClendon*, *supra*, the Court observed that "[i]t is foreseeable that state courts, exercising their common law powers, might develop different substantive standards" from federal law, thus "requiring the tailoring of * * * [defendants'] conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement." 111 S. Ct. at 484. See also *International Union, UAW* v. *Johnson Controls*, 111 S. Ct. 1196, 1209 (1991) (referring to "tort liability" as a state "requirement[]" that is subject to preemption).[6]

[6] Petitioner's efforts to distinguish *Garmon* (Br. 21-22 & n.23) cannot withstand analysis. Petitioner asserts that *Germon* has no precedential effect outside the area of the National Labor Relations Act, but the Court has relied upon *Garmon* in many non-NLRA cases. Petitioner is equally wrong that *Garmon* is no longer good law. See *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 381 (1986); *Farmer* v. *Carpenters*, 430 U.S. 290, 297 (1977). Finally, the cases cited by petitioner represent only one branch of the *Garmon* doctrine, which applies if the activity in question is "a merely peripheral concern" of federal law or touches "deeply rooted" local interests; this doctrine "involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 214 n.9 (1985). The other branch of *Garmon*, and the one relevant here, reflects "'federal protection of the conduct in question.'" *Farmer*, 430 U.S. at 295 n.5. Despite this Court's admonition that "'care must be taken to distinguish'" the two concepts (*ibid.*), petitioner "confuses preemption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the [NLRB]." *Brown* v. *Hotel Employees*, 468 U.S. 491, 502 (1984). Where a substantive federal rule is at issue, as it is here, "the balancing of state and federal interests * * * is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail" (*Allis-Chalmers*, 471 U.S. at 214 n.9); in that situation "'[t]he relative importance to the State of its own law is not material.'" *Brown*, 468 U.S. at 503 (citation omitted).

C. Construing Section 1334 To Exclude Common Law Claims Would Lead To Absurd Results.

Petitioner's interpretation, by engrafting an exception onto Section 1334 for state common law, would render the statutory scheme inherently incongruous and would produce highly anomalous consequences. Needless to say, "courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading." *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988). See also *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) ("'[w]e cannot attribute to Congress the intention to * * * open the door to such obvious incongruities and undesirable possibilities'") (citation omitted).

It is irrational to attribute to Congress, as petitioner does, the intent to vest in lay juries—while denying to democratically elected state legislatures and expert state administrative agencies—the power to review the adequacy of disclosures made pursuant to the federally-prescribed warning or cigarette advertising and, if they are found wanting, to determine for themselves on a case-by-case basis what different or additional disclosures are necessary. The First Circuit correctly understood that

"[i]t is inconceivable that Congress intended to have [its] carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state. * * * [Plaintiff's argument] arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies." *Palmer*, 825 F.2d at 626, 628.

In fact, state tort actions would be a particularly undesirable and uncertain form of regulation: it is difficult to ascertain exactly what common-law duty is embodied in a general jury verdict, especially given the "often * * * 'vague' and 'indeterminate' * * * standards" (*Ouellette*, 479 U.S. at 496) that juries apply under state common law. Ironically, petitioner and his *amici* extol the very inscrutability of jury verdicts as a virtue rather than a vice, but their efforts cannot obscure this fatal defect in their position. See Pet. Br. 41-42; Am. Br. of Trial Lawyers for Public Justice, at 13. Without question, manufacturers confronted with damages awards based on the claim that their warnings or advertising misinformed the public would attempt to alter their practices in an effort to deal with the problem.

Petitioner's reading of Section 1334 would lead to other anomalies as well. Under his view, for instance, a $100 fine for failure to provide a warning required by state statute would be preempted, but a $1 million damages award for failure to warn pursuant to state common law would not be. And a state court would be entirely free to establish such additional warnings in adjudicating a tort claim, but the state legislature would be barred from incorporating—or revising—those warning requirements in legislation. Petitioner's narrow and unnatural reading of the express preemption provision spawns, and offers no solution to, these peculiar and unimagined results.[7]

[7] Petitioner's approach also forces him to distinguish between judicially awarded injunctions (which he concedes are preempted) and judicially imposed damages (which he contends are not). See Pet. Br. 19-20. This Court, however, has "decline[d] * * * to draw a line [for preemption purposes] between the types of relief sought," specifically concluding that preemption principles do not distinguish between "*injunctive* relief" and "*compensatory* damages." *Ouellette*, 479 U.S. at 498 n.19. See also *Kalo Brick*, 450 U.S. at 317-318 (citation omitted) (preemption focuses on " 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted' ").

Construing Section 1334 to include state common law, by contrast, avoids such absurd consequences by recognizing what petitioner and his *amici* blindly refuse to acknowledge—that tort actions impose legal requirements or prohibitions just as much as state statutes and regulations and are preempted when they are incompatible with a federal statutory scheme. That principle provides a compelling refutation of petitioner's argument and serves as the background against which Congress enacted the preemption provision in the Labeling and Advertising Act. See, *e.g.*, *Miles* v. *Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation"). If Congress had intended to depart from that well-settled principle, it surely would have said so. See *Chisom* v. *Roemer*, No. 90-757 (June 20, 1991), slip op. 14; *United Savings Ass'n* v. *Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988).[8]

D. Petitioner's Maxims Of Statutory Construction Do Not Justify The Exclusion Of Common Law Claims.

In the face of this compelling showing that the Labeling and Advertising Act expressly preempts state common law tort claims, petitioner advances three grounds to support a contrary conclusion. First, petitioner relies on a "presumption against preemption," asserting that a "[c]ongressional intent to override this presumption must

[8] Petitioner's position also conspicuously ignores Congress's omission from the Labeling and Advertising Act of any savings clause preserving state common law remedies. Of course, even the presence of a savings clause would not preserve tort remedies that are inconsistent with the Act. See, *e.g.*, *Ouellette*, 479 U.S. at 492-493; *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986); *Kalo Brick*, 450 U.S. at 328, 330; *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

be expressed with drastic clarity." Pet. Br. 13, 18. Whatever validity this "presumption" may have in other contexts, where Congress's intent to displace state law in a given area remains insolubly ambiguous after a court has employed the usual tools of statutory construction, it is plainly inapplicable here. Congress has enacted a broad express preemption provision that unquestionably reflects its intent to prohibit state regulation of cigarette warnings and advertising—matters covered by a "comprehensive Federal Program" (15 U.S.C. § 1331).

Petitioner also contends (Br. 18, 23) that preemption is especially disfavored in areas of "traditional 'police regulation,'" such as protection of the public health. It is well settled, however, that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *de la Cuesta*, 458 U.S. at 153 (citation omitted). See also *Felder* v. *Casey*, 487 U.S. 131, 138 (1988); *De Canas* v. *Bica*, 424 U.S. 351, 357 (1976) ("even state regulation designed to protect vital state interests must give way to paramount federal legislation"); *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 638 (1973) (finding preemption of authority "deep-seated in the police power of the States"). It is undisputed that the Labeling and Advertising Act preempts state statutes and regulations that are designed, through the imposition of requirements related to the labeling, advertising or promotion of cigarettes, to protect the public health; petitioner has offered absolutely no reason why state common law requirements should be regarded as sacrosanct and given a preferred place in the hierarchy of federalism values.

Finally, petitioner argues (Br. 22 n.23) that common law claims may be preempted only where Congress has provided an "alternative remedy" and that the Labeling and Advertising Act supplies no such remedy. Both of these propositions are incorrect.

To begin with, this Court often has found preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55 (1987). In *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 391 n.4 (1987), for example, the Court overturned a court of appeals' decision rejecting preemption "unless the federal cause of action relied upon provides the plaintiff with a remedy"; in so ruling the Court emphasized that federal law is preemptive despite the fact that "the relief sought by the plaintiff could be obtained only" under state law. This principle has been consistently followed. See, *e.g.*, *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U.S. 282, 287, 289 (1986); *Operating Engineers* v. *Jones*, 460 U.S. 669, 684 (1983); *Kalo Brick*, 450 U.S. at 322-323; *Farmer* v. *Carpenters*, 430 U.S. 290, 298-299, 304 (1977); *WDAY*, 360 U.S. at 535. At least since *Garmon*, the law has been settled that "[e]ven the States' salutary effort to redress private wrongs or grant compensation for past harm" cannot justify state intrusion into a federal regulatory system notwithstanding that "the state remedy ha[s] no federal counterpart." 359 U.S. at 247. See also *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981) ("a finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed"); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-155 (1964) (Jones Act preempts state law even though plaintiff had no cause of action under the Act).

In any event, petitioner's argument is misguided even on its own terms, because the Labeling and Advertising Act in fact contains effective alternative remedies. First, it provides a preventive remedy in the form of a mandatory warning—a warning that Congress itself drafted and determined to be adequate to protect the public health. If a court in a traditional failure-to-warn case enjoined the defendant to furnish a particular warning, it could hardly be said that there had been no relief. The federal statute legislatively affords the same remedy. Second, the

Act expressly preserves the authority of the Federal Trade Commission "with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. Congress fully expected that advertising or promotion that might undermine the effectiveness of the mandated warning would be monitored and prohibited at the national level.

At the end of the day, petitioner fails to provide any answer to the dispositive question: Why would Congress have painstakingly drafted a warning label that it considered to be adequate, required every cigarette manufacturer (on pain of civil and criminal penalties) to place that warning, and only that warning, on every package of cigarettes, and expressly preempted state statutes and regulations relating to the labeling, advertising and promotion of cigarettes in order to achieve uniformity in interstate commerce, and at the same time allowed state juries to reject the adequacy of the federal warning and create a regime of disuniformity by imposing diverse advertising requirements? Put another way, if Congress had intended to permit state law to supplement the information that cigarette manufacturers must provide to consumers, why would it have disabled state legislatures and administrative agencies from playing that role and allowed only state juries—rendering inscrutable verdicts in individual cases (see Pet. Br. 41-42)—to decide whether more or different information should have been given? The intrinsic incoherence of such a scheme is a convincing rebuttal to petitioner's argument. Both the language and purpose of the Labeling and Advertising Act, and settled principles of preemption, compel the conclusion that the Act expressly preempts state common-law torts.[9]

[9] This Court's decision in *Silkwood* does not warrant a different conclusion. As the opinion makes clear (464 U.S. at 249-256), and as the Court subsequently has explained, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries." *English*, 110 S. Ct. at 2279.

II. THE CIGARETTE LABELING AND ADVERTISING ACT IMPLIEDLY PREEMPTS STATE LAW, INCLUDING STATE COMMON LAW, CONCERNING THE HEALTH ASPECTS OF CIGARETTE WARNING LABELS AND THE PROMOTION OR ADVERTISING OF CIGARETTES

For the reasons given in Part I, it is unnecessary to look beyond the explicit language of 15 U.S.C. § 1334 to conclude that petitioner's state law tort claims, predicated on the inadequacy of the federally-mandated warning and alleged defects in respondents' advertising, are preempted by the Labeling and Advertising Act. Even in the absence of express preemptive language, however, "Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" if

Although acknowledging the "tension" between state damages actions and exclusive federal regulatory authority (464 U.S. at 256), the Court in *Silkwood* nevertheless held that there was no preemption because it found that "Congress intended * * * to tolerate [such] tension" (*ibid.*). In particular, the Court read the Price-Anderson Act—which established an indemnification scheme for nuclear operators held liable under state tort law—to constitute affirmative evidence of Congress's acceptance of state tort actions (*id.* at 251-256). Furthermore, the Atomic Energy Act of 1954 contains no preemption provision (see *Pacific Gas & Elec. Co.* v. *Energy Resources Comm'n*, 461 U.S. 190, 205 (1983)) and in fact explicitly preserves significant authority for the states (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). See *Kotler* v. *American Tobacco Co.*, 926 F.2d 1217, 1223 (1st Cir. 1990), petition for cert. pending, No. 90-1473 (filed Mar. 19, 1991).

Finally, the sole question in *Silkwood* was whether federal law preempted state *punitive* damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for *compensatory* damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law. See *Palmer*, 825 F.2d at 628. Unlike the Atomic Energy Act as construed in *Silkwood*, the Labeling and Advertising Act contains no comparable indication of congressional intent to "tolerate [the] tension" (464 U.S. at 256) between federal and state law and unquestionably was designed to preempt state law in the area of health and smoking.

" 'compliance with both federal and state regulations is a physical impossibility,' " or if "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wisconsin Public Intervenor* v. *Mortier*, No. 89-1905 (June 21, 1991), slip op. 5, 6 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioner's tort claims are preempted on these grounds as well.

A. The Labeling And Advertising Act Occupies The Field With Respect To The Health Aspects Of Cigarette Warning Labels And The Promotion Or Advertising Of Cigarettes.

The principal defect in petitioner's discussion of "occupation of the field" preemption is his faulty definition of the "field" at issue. As this Court has explained, " 'we must know the boundaries of th[e] field before we can say that [Congress] has precluded a state from the exercise of any power.' " *De Canas*, 424 U.S. at 360 n.8 (citation omitted). Preemption occurs for the "specific field" (*Wardair Canada* v. *Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986)) or "particular area" (*California Federal Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987)) that Congress has occupied. See also, *e.g.*, *De Canas*, 424 U.S. at 357 n.5; *Pacific Gas & Electric*, 461 U.S. at 224 (Blackmun, J., concurring). The determination of the " 'boundaries' " of that field is a matter of statutory construction, and the Court " 'look[s] to the federal statute itself, read in the light of its constitutional setting and its legislative history.' " *De Canas*, 424 U.S. at 360 n.8 (citation omitted).

Applying that standard, it is apparent that the relevant field here is not petitioner's straw men (Br. 15, 32) of all health or compensation issues arising from cigarette smoking. Rather, the language of the statute makes evident—and the legislative history canvassed by respondents confirms—that Congress was concerned with the health

aspects of (a) cigarette *warnings* and (b) the *promotion or advertising* of cigarettes. As to those matters, Congress unquestionably expected that its regulatory scheme —including the warnings it specifically drafted—*would* be exclusive, for "[t]here 'can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive.' " *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (citation omitted). See *Papas* v. *Upjohn Co.*, 926 F.2d 1019, 1025 (11th Cir. 1991), petition for cert. pending, No. 90-1837 (filed May 29, 1991).

Congress did not leave its purposes and objectives to speculation. It included a "declaration of policy and purpose" in the Labeling and Advertising Act (15 U.S.C. § 1331 (emphases added)), stating that it wanted to establish "a *comprehensive* Federal Program to deal with cigarette labeling and advertising with respect to *any* relationship between smoking and health." This program was to be the means "*whereby*" the public was to be "*adequately*" informed that smoking may be hazardous to health. The information was to be conveyed by a "warning" to that effect on each cigarette package. The terms, size, and placement of the warning were elaborately specified by Congress itself. "*No*" other health warning was allowed to be required, and "*no*" other requirement or prohibition based on smoking and health could be imposed by state law on the advertising and promotion of cigarettes. 15 U.S.C. § 1334 (emphasis added). The purpose of specifying the warning and eliminating all competing warning and advertising requirements was itself spelled out: to protect "commerce and the national economy" to the "*maximum extent*" consistent with *Congress's* warning scheme and to prevent the impeding of commerce and the national economy by "*diverse, nonuniform, and confusing*" labeling and advertising regulations addressed to "*any*" relationship between smoking and health. 15 U.S.C. § 1331 (emphasis added).

In light of this declaration, it is inconceivable that Congress could have intended the states to exercise any au-

thority over the subject matter covered by the federal statute. Congress viewed regulation of the health aspects of cigarette warnings and advertising as a national problem demanding a "comprehensive" national solution. Indeed, petitioner effectively concedes this point. He acknowledges (Br. 27) that "Congress intended to occupy the narrow field of affirmative rulemaking with respect to health warnings on cigarette packages and in cigarette advertising."

Petitioner's asserted limitation to "affirmative rulemaking," however, is simply a retooling of his argument that the Labeling and Advertising Act preempts only statutory and regulatory "requirements" and not common law tort actions (see Pet. Br. 15 n.17). We have explained above that that distinction reflects a misunderstanding of general legal principles and a misreading of the Act. Without that unfounded qualification, petitioner's brief—inadvertently but tellingly—recognizes that Congress *has* occupied the particular field of health-related cigarette warnings and advertising. Because such an occupation of the field leaves no room for state law, petitioner's common law tort claims are preempted.

B. Common Law Tort Claims Are Preempted Because They Would Conflict With Federal Law And Would Frustrate The Purposes And Objectives Of Congress In Enacting The Labeling And Advertising Act.

The court of appeals held that the Labeling and Advertising Act impliedly preempts " 'state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes.' " 893 F.2d 541, 582 (3d Cir. 1990), quoting 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). The court explained that the imposition of state tort "liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act [would] have the effect of tipping the Act's balance of

purposes and therefore actually conflict with the Act." 789 F.2d at 187. This conclusion is plainly correct and is consistent with the ruling of every other federal appellate court to have considered the issue.[10]

Petitioner's attack on the Third Circuit's holding begins with the radical suggestion (Br. 14-15, 24) that if a court concludes that an express preemption provision is inapplicable in a particular case, it should not apply the doctrine of implied preemption but instead should automatically hold the state law permissible—regardless of any actual conflict between federal and state law. Contrary to petitioner's implicit premise, however, the fact that state law falls outside an express preemption provision does not necessarily mean that Congress affirmatively intended to allow such state action. All that can be said in those circumstances is that Congress did not foresee or consider the issue and thus did not provide for express preemption—thereby leaving it to the courts to decide, under the Supremacy Clause, whether state law is impliedly preempted because it conflicts with federal law or frustrates the purposes and objectives of Congress.

There is no plausible reason why Congress, by enacting an express preemption provision, would have wanted to create an immunity from implied preemption for conflicting state laws. Petitioner's approach would work a revolutionary change in the doctrine of preemption and cannot be squared either with this Court's settled formulation of preemption principles (see, *e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977)) or with the Court's decisions that have independently applied express and implied preemption.

In *Northwest Cent. Pipeline* v. *Kansas Corp. Comm'n*, 489 U.S. 493 (1989), for example, the Court considered

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[10] See *Kotler* v. *American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), petition for cert. pending, No. 90-1473 (filed Mar. 19, 1991); *Pennington* v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen* v. *American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer* v. *Liggett Group, Inc.*, *supra*.

the preemptive effect of the Natural Gas Act, which contained express preemption provisions assigning exclusive regulatory control over the interstate transportation and sale of natural gas to the federal government while reserving jurisdiction over the production and gathering of natural gas to the states. After finding that a state order was not expressly preempted, the Court went on to consider whether it was impliedly preempted, emphasizing that this was a necessary and appropriate inquiry notwithstanding the express statutory division of regulatory authority (*id.* at 515-516 n.12 (emphasis in original)):

> [C]onflict-pre-emption analysis *is* to be applied, even though Congress assigned regulation of the production sphere to the States and Kansas has acted within its assigned sphere. • • • Only by applying conflict pre-emption analysis can we be assured that *both* state and federal regulatory schemes may operate with some degree of harmony.

This sensible mode of analysis has been followed without question in other cases and forecloses petitioner's argument. See, *e.g.*, *Ingersoll-Rand*, 111 S. Ct. at 482, 484-485; *Jones*, 430 U.S. at 525, 540-541; *id.* at 544 (Rehnquist, J., concurring in part and dissenting in part); see also *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 591 (1987) (noting congressional intent not to preempt state law "except in cases of actual conflict"); cf. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 705 (1984) (finding both express and implied preemption under FCC regulations).

Once petitioner's diversion is put to one side, it is clear that state tort claims imposing warning requirements different from or in addition to the congressionally-mandated warning are impliedly preempted, because state law would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. See *de la Cuesta*, 458 U.S. at 156. The Labeling and Advertising Act contemplates a single, succinct, uniform, national warning, so that the public would not be confused, and interstate commerce would

not be burdened, by diverse and nonuniform warnings imposed by the states. 15 U.S.C. § 1331. The Act's legislative history is replete with expressions of Congress's desire to avoid the chaotic conditions that would result if other authorities were permitted to impose their own health warning requirements. See, *e.g.*, S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965); H.R. Rep. No. 449, 89th Cong., 1st Sess. 4 (1965).

If a manufacturer were compelled by the threat of damages liability under state tort law to alter or supplement the warning on its cigarette packages, it would frustrate these goals and lead directly to the "diverse, nonuniform, and confusing" labeling that Congress sought to avoid.[11] Rather than the "short and direct" (S. Rep. No. 195, *supra*, at 4) cautionary statement that Congress felt to be most effective, consumers would be confronted with lengthy and legalistic warnings. Moreover, the warnings undoubtedly would vary from state to state, depending upon the requirements of local law. Perhaps unwittingly, the *amicus* brief of the former Surgeons General revealingly describes the many complex issues that are committed to the jury's discretionary determination in a common-law failure-to-warn case (Am. Br. 11-12 (emphasis added)):

> If the warning is *accurate, clear and unambiguous*, if it is *sufficiently intense in language* to communicate the gravity of the risks involved in the use of the product, if it is *complete and unclouded* by contradictory messages, and as long as the methods chosen are *likely to find their way to those who need the warning*, the duty to warn is satisfied.

Under such an approach, differing jury outcomes—both within a state and among states—are certain to arise. The regime envisioned by petitioner would be completely

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[11] Of course, to the extent that state law required manufacturers to put warnings on the cigarette package itself that were different from or in addition to that drafted by Congress, it would be impossible to comply with both state and federal law. See 15 U.S.C. § 1333; *Florida Lime*, 373 U.S. at 142-143.

unworkable and would bear no resemblance to the uniform regulatory scheme Congress intended.[12]

It is no answer to this inevitable inconsistency to suggest that a national manufacturer may obtain "uniformity" by complying with the most stringent state standard. To begin with, there is no reason why a single state should be allowed to assume the power to establish what is, as a practical matter, a nationwide rule; that is the responsibility of Congress, and one that it has specifically discharged in adopting the Labeling and Advertising Act. In any event, state standards in this area are not necessarily linear and cannot be ranked in order of stringency. For example, each of the 50 states could require a different "fact" to be disclosed or to be disclosed in a different manner; in that situation, compliance with no one state's law would satisfy the requirements of the other states, and compliance with all 50 rules would result in a jerry-built conglomeration that would confuse and overwhelm rather than inform consumers. Even worse, one state might require certain information that another state prohibits as misleading, unproven, or superfluous, thereby leaving cigarette manufacturers without any single warning label that can be used across the country. A greater departure from the congressional objective of uniformity can scarcely be conceived. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

Petitioner offers little response to these concerns, other than to proclaim (Br. 41) that any conflict between federal and state law is merely potential or hypothetical. Contrary to petitioner's assertion, however, preemption is not limited to "circumstances in which federal and state laws are plainly contradictory" but also includes "those in which the incompatibility * * * is discernible only

[12] Similar results would surely follow if states were permitted to regulate health-related claims in the advertising or promotion of cigarettes. Common law claims would result in an inconsistent patchwork of requirements and prohibitions that would be "diverse, nonuniform and confusing" and that would burden "commerce and the national economy" (15 U.S.C. § 1331(2)).

through inference." *Hayfield Northern R. Co.* v. *Chicago & N.W. Trans. Co.*, 467 U.S. 622, 627 (1984). See *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 310 (1988). For the reasons already discussed, the conflict between the Labeling and Advertising Act and state tort law plainly is sufficient to establish, at the least, such "incompatibility."[13]

Petitioner also asserts (Br. 39) that state tort law is not impliedly preempted here because it has the same purpose as the Labeling and Advertising Act: the provision of information to consumers.[14] But Congress's objective was not to maximize at all costs the amount of information to be provided to consumers; rather, as the Act itself indicates (15 U.S.C. § 1331), Congress balanced that objective against the need for uniformity and the protection of commerce and the national economy. See *Palmer*, 825 F.2d at 623, 626. Of course, even if federal and state law had the same general purpose, state law would still be preempted because its means of achieving that end conflict with those chosen by Congress. See *Ouellette*, 479 U.S. at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal"); *Pacific*

[13] Several of the *amici* supporting petitioner seek to engage the Court in the continuing debate over smoking and health. See Am. Br. of American College of Chest Physicians, at 7, 22; Am. Br. of Former Surgeons General, *et al.*, at 5; Am. Br. of American Cancer Society, *et al.*, at 20; Am. Br. of American Medical Association, at 15, 18; see also Am. Br. of National League of Cities, *et al.*, at 19-20 n.12. These briefs make clear that their motivation for espousing common law tort claims is a policy disagreement with Congress as to the wisdom of its approach to the issue of smoking and health in general and the adequacy of the congressionally-drafted warning in particular. But what could be a more vivid illustration of frustration of congressional objectives than a common law judgment of liability that depends on a finding that the warning Congress expressly determined to be adequate is in fact inadequate?

[14] This argument, of course, is inconsistent with petitioner's earlier contention that state tort law is not regulatory in nature.

Gas & Electric, 461 U.S. at 216 n.28; *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971). There can be no doubt that the method adopted by Congress to ensure that health information is provided to consumers—requiring that a short, direct and uniform nationwide warning be placed on each package of cigarettes, and requiring the FTC to police the fairness and accuracy of cigarette advertising—is in irreconcilable conflict with the regulatory regime of state tort law.

Finally, petitioner errs in asserting (Br. 43) that Congress recognized and accepted the conflict between the Act and state tort law. This case is a far cry from *Silkwood* and the other cases petitioner relies upon, in which there was affirmative evidence that Congress was aware of and approved the continued application of divergent state law. See pages 20-21, note 9, *supra*. Here, by contrast, every indication points to the opposite conclusion, including Congress's own role in drafting and later revising the warning label to ensure its adequacy. The mere fact that a few congressmen may have assumed that some tort suits against cigarette manufacturers would continue to be permissible certainly does not imply that Congress intended to allow tort suits such as this one, which can succeed only if a jury concludes that the federal warning and advertising scheme is inadequate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

PLAC members include: American Home Products Corporation; American Telephone & Telegraph Company; Amoco Corporation; Amsted Industries, Inc.; Anheuser-Busch Companies, Inc.; Association of International Automobile Manufacturers, Inc.; The Boeing Company; Bridgestone/Firestone, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Handling Company; The Coca-Cola Company; The Coleman Company; Dana Corporation; Deere & Company; Defense Research Institute; Digital Equipment Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; FMC Corporation; Federal-Mogul Corporation; Ford Motor Company; Freightliner; The Gates Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Company; Gravely International, Inc.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Hoechst Celanese; Honda North America, Inc.; Hyundai Motor America; Ingersoll-Rand Company; Isuzu Motors, America, Inc.; Johnson Controls, Inc.; Joy Technologies, Inc.; Kawasaki Motors Corp., U.S.A.; Eli Lilly and Company; Melroe Company; Mercedes-Benz of North America, Inc.; Merck & Company, Inc.; Michelin Tire Corporation; Miller Brewing Company; Minnesota Mining and Manufacturing Company; Mitsubishi Motor Sales of America; Monsanto Company; O.F. Mossberg & Sons, Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Navistar International Transportation Corp.; New United Motor Manufacturing, Inc.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Philip Morris Companies, Inc.; Piper Aircraft Corporation; Pirelli Armstrong Tire Corporation; Playtex Family Products Corp., Inc.; Porsche Cars North America, Inc.; Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Schindler Elevator Corporation; Snap-on Tools Corporation; Squibb Corporation; Sturm, Ruger and Company; Subaru of America, Inc.;

TRW, Inc.; Toyota Motors Sales, U.S.A., Inc.; U-Haul International; Union Carbide Corporation; Unocal Corporation; The Upjohn Company; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Vulcan Materials; Jervis B. Webb Company; Whirlpool Corporation; and Yamaha Motor Corporation, U.S.A.